

AGORA International Journal of Juridical Sciences, www.juridicaljournal.univagora.ro
ISSN 1843-570X, E-ISSN 2067-7677
No. 4 (2014), pp. 113-117

THE RIGHT TO LEGAL ASSISTANCE AND REPRESENTATION – GENERAL ASPECTS

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Abstract:

The current paper wishes to generally analyze the right to legal assistance and representation, a component of the right to be defended and of the right to an equitable trial, which is regulated in internal law as well as in international law, such as the European Convention of Human Rights or the African Charter on Human and Peoples' Rights.

Keywords: legal assistance, legal representation, right to be defended, result obligations, diligence obligations.

Introduction

The right to legal assistance and representation in front of the courts, prosecution, authorities with jurisdictional activity, public notaries and judicial executors, organs of the public administration, institutions and other entities represents an important guarantee for protecting the individuals' rights and legitimate interests. This is the reason why this essential right is largely regulated within the international, European as well as national legislation.

National and international regulation of the right to legal assistance and representation

Legal assistance is obviously an important component of the right to be defended, a fundamental right protected by the Romanian Constitution, which expressly regulates that “the right to be defended is guaranteed”¹, at the same time showing that “throughout the entire trial, the parties have the right to be assisted by a lawyer, appointed by the Bar or chosen by the party”².

An essential component of the right to an equitable trial, a right expressly guaranteed by the European Convention on Human Rights means that “any defendant has the right to defend himself or be assisted by a chosen lawyer or, if he doesn't have the necessary means to pay a lawyer, he can be assisted by a lawyer appointed by the Bar for free, when it is in the best interest of justice to do so”³.

A similar provision is found in the African Charter on Human and People's Rights, which states that “every person has the right to be defended, including the right to be defended by a lawyer of his own choice”⁴.

Article 13 of the New Code of Civil Procedure is imperative that the right to defense is guaranteed, showing further that the parties have the right, throughout the trial, to be represented or, where appropriate, assisted according to the law. However, “parties are provided the opportunity to participate in all phases of the trial. They can ascertain the contents of the file,

¹ Article 24, alignment (1) of the *Romanian Constitution*.

² Article 24, alignment (2) of the *Romanian Constitution*.

³ Article 6, point 3, letter c of the *European Convention on Human Rights*.

⁴ Article 7, point 1, letter c of the *African Charter on Human and Peoples' Rights*.

propose evidence to make their defense, submit their claims in writing and orally and to exercise legal remedies under the conditions provided by law.”⁵

The content of the legal assistance and representation activity

According to the provisions of the Lawyer Profession’s Statute, the lawyer has the legal right to ensure assistance and legal representation for his clients in front of the courts, prosecution, authorities with jurisdictional activity, public notaries and judicial executors, organs of the public administration, institutions and other entities in order to protect and represent by specific means the rights and legitimate interest of a person.⁶

A while ago, it was stated that “a new opinion seems to become more and more significant, an opinion according to which it is necessary and even mandatory to distinguish between the activity of **arguing lawyers** (who appear quite often in court) and **consultant lawyers** (who participate in negotiations, transactions, commercial mediation)”⁷.

For now, we can state that such a delimitation is somewhat achieved, in addition to a rigorous specialization of lawyers in specific branches of the law.

This delimitation is supported by the phrasing of article 3 first alignment of the Law for organizing and exercising the profession of lawyer, which, in letter a) mentions “consultation and legal complaints” and in letter b) discusses “assistance and legal representation” in front of the court and other organs of the state.

In regard to legal consultation, it was stated that “it represents a business just like any other” and “its essence is that it sells knowledge, know-how, intelligence, experience, information, relations and, most of all, solutions” which are “destined exclusively for the consumers – companies, holdings which look for certain solutions: financial optimization, general performance, certain components or assistance in acquiring other companies”⁸.

As it was stated in doctrine “the right to provide legal assistance represents the substance of the lawyer’s activity. It has two essential components – assistance and representation in front of the judicial organisms. The brightness of the lawyer’s activity can manifest as he exercises his function, since the trial is qualified as “an extraordinary surgical act”⁹. The culminating point of this activity is the lawyer’s closing argument¹⁰, which can “provide an exceptional reputation or even fame for a lawyer”¹¹.

In regard to the closing argument, it was stated that “it is an act of cultural and scientific creation” and “it is conceived and prepared progressively, from the beginning of the trial, throughout the development of the trial and becomes definite around or even at the time it is delivered to the court”; also “it must be rich in content, strong and convincing, appropriate to the cause and within the limits stated by law and professional ethics”¹².

It was also believed that legal representation “is the main form of defending a person in a civil lawsuit [...] because the lawyers are experienced in law and thus, they have, the necessary qualification to confront, in the name of the person they defend, all the avatars of the legal duel”; furthermore, it was stated that “lawyers benefit from a real monopoly in regard to one of the main components of the judicial duel”¹³.

⁵ Article 13, alignment (3) of the *Romanian Civil Procedure Code*.

⁶ See article 91 alignment (1) of the *Lawyer Profession’s Statute*.

⁷ Cerasela Carp, D. Panainte, *Ghidul avocatului de succes*, “All Beck” Publishing House, Bucharest, 2003, page 119.

⁸ *Ibidem*, page 122.

⁹ L. Matray, *Comment peut-on être avocat?* in „Avocats d’Europe”, “Eugène Wahle” Publishing House, Liège, 1977, page 13.

¹⁰ I. Leș, *Instituții judiciare contemporane*, “C.H. Beck” Publishing House, Bucharest, 2007, page 293.

¹¹ *Ibidem*, page 265.

¹² O. A. Stoica, *Metode și mijloace pentru îmbunătățirea activității avocatului* in *Romanian Law Magazine* no 8/1972, page 98.

¹³ C. Murzea, E. Poenaru, *Reprezentarea în dreptul privat*, “C.H. Beck” Publishing House, Bucharest, 2007, page 118 and following.

In exercising his activity of legal assistance and representation, the lawyer will use all the means and operations allowed by law, in order to defend and protect the interest of his client.

Thus, the interest of the client is the most important, being the main reason for the lawyer's activity, which must avoid and remove:

- a. the existence of a personal interest or any interest of a person close to him regarding the trial;
- b. exercising his activity in order to become more appealing to clients, judges or the audience;
- c. exercising the activity for complaisance;
- d. the existence of any pressure of not respecting the professional secret"¹⁴.

In regard to the nature of the obligations the lawyer assumes, these are usually diligence obligations or obligations of means, as the lawyer commits to undergo all that is necessary in order to obtain a certain result, without obligating himself to secure that result

In other words, "he must provide – all his legal knowledge, his gift and talent in order to obtain the desired result"¹⁵.

Of course there are certain situations in which the lawyer assumes result obligations, for example when the object of the contract comprises of editing a certain legal document and so on.

Thus, as the provisions of the Lawyer's Statute describe, the lawyer "must advise his client promptly, correctly, diligently and in good faith (...)"¹⁶. He is basically "a first judge for the trial in which he is required to argue, as he has the obligation to point out – in regard to the specific situation – which are the rights, obligations and liabilities of the person who requires his assistance"¹⁷.

It was stated in doctrine that "there are a series of professional relations between a lawyer and his clients, relations with a very important legal content, relations of professional ethics, thus the lawyer must have a complex role of: confidant, adviser, protector and educator of his client, all these within the limits of certain legal rules and methodologies"¹⁸.

Also, the lawyer must be diligent in defending the liberties, rights and legitimate interests of his client, as he must abstain from exercising his duty if he feels he can't provide competent assistance and representation. However, there is an exception "in certain urgent situations, in order to save and protect the rights and interests of the client, the lawyer can assist and engage the client even if, at the moment, he has no professional competence, if by delaying the trial, the rights and interests of the client would be harmed. In these situations, the lawyer will stick to only what is reasonable necessary according to the circumstances and legal provisions"¹⁹.

The legal assistance contract

According to the current legal provisions "the lawyer who is registered with the Bar, has the right to assist and represent any person or company, based on a contract concluded in writing, a contract which becomes of a clear date as it is registered in the general inventory registry"²⁰.

The contract is concluded between the lawyer, on one hand and the client or his representative, on the other hand. The necessary clauses of the legal assistance contract are expressly stated in the Profession's Statute²¹. The lawyer and the client can agree that the

¹⁴ Article 109, alignment (3) of the *Profession's Statute*.

¹⁵ C. Murzea, E. Poenaru, *op. cit.*, page 124 and following.

¹⁶ Article 111 of the *Profession's Statute*.

¹⁷ O. A. Stoica, *op. cit.*, page 101.

¹⁸ Ibidem, page 100 and following.

¹⁹ Article 133, alignment (5) of the *Profession's Statute*.

²⁰ Article 29, alignment (1) of *Law no 51/1995 republished*.

²¹ According to article 122 alignment (1) of the *Profession's Statute* "The legal assistance contract must contain the following: a) identification information of the lawyer, name, headquarters and the representative; b) identification information of the client: the legal representative, if it should be the case; c) the object of the contract which can be limited to one or more of the activities stated by article 3 of the law or it can have a general character, allowing the lawyer to undergo acts for administration and conservation of the client patrimony; d) the fee; e) certification of the

beneficiary of the services be a third party, provided that he accepts, even tacitly, the conclusion of the contract in the specified terms.

In regard to formal conditions, as stated above, the law states *ad probationem* that the contract is concluded in writing. The legal assistance contract can be concluded verbally as an exception, provided that it is turned into a written contract as soon as possible²².

As for the means of concluding the contract, the most common is the conclusion of the contract while both parties are present; however we can't leave out the possibility of concluding such a contract by any means of communication if the parties are not present²³.

In the latter situation there is the problem of the date of the contract. The answer is found in the Profession's Statute, which establishes that the date of the contract is that certain date when the parties agreed upon the contract. The law states two presumptions in regard to the moment when the lawyer knew of the conclusion of the contract: the date when the contract arrived, by fax or email, at the professional headquarters of the lawyer and the date the lawyer signed as a confirmation that he received the contract.

As for the first presumption, the lawmaker stated that, if the fax transmission occurs after 19.00 hours, it is considered that the lawyer knew of it the following day.

The legal assistance contract can be concluded in the form of an engaging letter, in which the legal relations between the lawyer and the receiver of the letter will be stated, as well as the lawyer's services and his fee. This letter will be signed by the lawyer and sent to his client. "In case the client signs the letter by expressly mentioning the he accepts the content of the letter, this becomes a contract of legal assistance"²⁴.

There are certain atypical cases, as is the situation of legal assistance provided by the Bar, where there is no written contract between the lawyer and the client he defends; the lawyer exercises his profession based on the demand of the court, police or organs of public administration, as the lawyer is appointed by the legal assistance service which exists within the Bar where the lawyer is registered"²⁵.

Within the legal assistance contract, the powers which the client grants his lawyer are strictly stated. Based on this contract, the lawyer will exercise his profession by providing a power of attorney. "In lack of any contrary provisions, the lawyer must perform any act which he believes is necessary in order to achieve the interests of his client"²⁶.

In regard to the activities clearly stated in the legal assistance contract, this document is, by nature, a special mandate. Based on this, the lawyer has the right to conclude certain acts on behalf of his client: conservation, administration or dispositions acts.

Judicial Assistance

The party that is unable to meet the costs occasioned by supporting a trial, without thereby put in danger his own maintenance and that of his family, he may, under Article 90 of the Code of Civil Procedure, benefit for assistance according to the law on legal aid.

Legal aid includes:

- Granting exemptions, reductions, rescheduling or deferral for payment of court fees prescribed by law;
- Defense and free assistance by a lawyer appointed by the Bar;
- Any other means provided by law²⁷.

With regard to legal persons, they can avail the facilities in the form of discounts, rescheduling or delays to pay court fees due to actions and applications made to the courts, under the special law conditions.

client or his representative's identity; f) ways of solving any litigation between the lawyer and the client; g) signature of both parties".

²² According to article 121, alignment (5) of the *Profession's Statute*.

²³ Article 121, alignment (2) of the *Profession's Statute*.

²⁴ Article 121, alignment (3) of the *Profession's Statute*.

²⁵ Ligia Dănilă, *Organizarea și exercitarea profesiei de avocat*, "C.H. Beck" Publishing House, Bucharest, page 64.

²⁶ Article 126, alignment (2) of the *Profession's Statute*.

²⁷ Article 90, alignment (2) of the *Romanian Civil Procedure Code*.

Conclusions

The paper, divided into six subsections, was designed to emphasize the importance of legal assistance and representation both in national legislation as well in the international context.

Following the introductory part, the second section was meant to put into the light the main regulations of the legal assistance and representation, regarded both from the national and international point of view. The third section was dedicated to the content of the legal assistance and representation, which is considered to be the substance of the lawyer's activity.

The fourth section – the legal assistance contract – presents the formal aspects needed to be accomplished when concluded such a contract, as well as issues connected its content.

The fifth section emphasizes the content of the judicial assistance as well as the conditions required for those who benefit of it.

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